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12 Attorneys for Creditors
13 Bank of America, N.A., Dorothy R.
14 Wurlitzer and Lindsay P. Wurlitzer as
15 Co-Trustees of the Raimund B.
16 Wurlitzer Revocable Inter Vivos Trust
17 dated January 29, 1981

18 UNITED STATES BANKRUPTCY COURT
19
20 NORTHERN DISTRICT OF CALIFORNIA
21
22 OAKLAND DIVISION

23 JAMES JOHN KENNEDY,
24
25 Debtor.

Chapter 13

Case No. 11-49863 EDJ 13

OPPOSITION TO DEBTOR'S MOTION FOR
ASSUMPTION OF UNEXPIRED LEASE AND
NOTICE OF DEADLINE TO REQUEST A
HEARING; COUNTER-MOTION TO REJECT
LEASE

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1 Creditors Bank of America, N.A., Dorothy R. Wurlitzer and Lindsay P. Wurlitzer as Co-
2 Trustees of the Raimund B. Wurlitzer Revocable Inter Vivos Trust dated January 29, 1981, as
3 amended (collectively, "Wurlitzer"), hereby file its Opposition to the Motion of James John
4 Kennedy, Debtor, ("Debtor") for Assumption of Unexpired Lease (the "Motion").

5 **I. BACKGROUND FACTS**

6 **A. The Lease**

7 On approximately August 28, 2009, the Debtor, Louis Toth¹ and Home Haven LLC, a
8 California limited liability company, collectively as "Tenants," entered into a Lease ("Lease")
9 with Wurlitzer, as Landlord, for the space located at 1444 Burlingame Avenue, Burlingame,
10 California, 94010 ("Premises"). *See* Declaration of Frederick Schifferle In Support of Opposition
11 to Motion ("Schifferle Declaration"), Exh. A. The Lease is a triple-net lease, requiring the
12 Tenants to pay, among other things, real property taxes and insurance for the Premises. *Id.* The
13 Tenants operated and continue to operate the Premises as a home furnishings store. Schifferle
14 Declaration at ¶2.

15 **B. The Promissory Note**

16 In conjunction with the signing of the Lease, the Tenants also signed a Promissory Note
17 dated August 28, 2009 in favor of Wurlitzer in the principal amount of \$47,500 for the amount
18 Wurlitzer advanced to the Tenants to enable them to buy-out the lease of the prior tenant of the
19 Premises ("Promissory Note"). Schifferle Declaration, Exh. B attached to Exh. A. Under the
20 terms of the Promissory Note, the Tenants are obligated to pay equal monthly payments of
21 principal and interest in the amount of \$963.13, commencing on October 1, 2009 and ending on
22 September 1, 2014. *Id.* At ¶2. Each of the Lease and Promissory Note contain cross-default
23 provisions, so that a default under the Promissory Note constitutes a default under the Lease, and
24 vice versa. *Id.* at ¶19 (of the Lease) and at ¶6 (of the Promissory Note). Tenants' first default
25 under the terms of the Promissory Note occurred on November 1, 2009 – less than two months
26 after signing the Lease and Promissory Note. Schifferle Declaration at ¶4. As of October 1,

27
28 ¹ On September 13, 2011, Mr. Toth also filed a Chapter 13 case in the Bankruptcy Court for the Northern District of California, San Francisco Division, Case No. 11-49859. Home Haven, LLC has not filed for bankruptcy.

1 2011, under the terms of the Promissory Note, Tenants owe Wurlitzer \$7,370.34 in unpaid
2 principal, interest and late fees.² *Id.*

3 C. Tenants' Defaults Under the Lease and Promissory Note

4 To make matters worse, the Tenants defaulted under the terms of the Lease numerous
5 times – 30 times to be exact. *Id.* at ¶5. The Tenants' first default occurred in November 2009
6 when Tenants failed to pay Promissory Note payments; Tenants began paying rent late as early as
7 December 2009. *Id.* Then Tenants failed to pay January 2011 rent in the amount of \$8,590 and
8 installments of real property taxes and insurance covering the 2009/2010 and 2010/2011 years.
9 *Id.* Wurlitzer personally served Tenants with another set of Three-Day Notices on January 14,
10 2011. *Id.* Tenants eventually paid January 2011 base rent, leaving real property taxes and
11 insurance covering the 2009/2010 and 2010/2011 years unpaid. *Id.*

12 Less than a month later, the Tenants issued a check for February 2011 rent, which
13 bounced. *Id.* at ¶6. After the check bounced, the Tenants could only make half of the payment
14 for February 2011 rent. *Id.* In keeping with the same pattern of nonpayment, the Tenants failed
15 to pay March 2011 rent and the Tenants still had not yet paid real property taxes and insurance
16 covering the 2009/2010 and 2010/2011 years or Promissory Note payments by March 1, 2011.
17 *Id.* Consequently, Wurlitzer served another set of Three-Day Notices on the Tenants for these
18 nonpayments and issued a demand for payment of the Promissory Note payments on March 16,
19 2011. *Id.* After that, Tenants paid the other half of the February 2011 rent and the rent for
20 March 2011. *Id.* Tenant made no other payments for amounts due and owing as of March 1,
21 2011. *Id.* Wurlitzer served Three-Day Notices on the Tenants on May 19, 2011 for \$42,628.58
22 due and owing under the Lease. *Id.* Tenants immediately made a payment in the amount of
23 \$8,590, which was over \$34,000 short of the amounts due under the Lease and Promissory Note.
24 *Id.* Wurlitzer promptly returned the \$8,590 payment to the Tenants, explaining that the payment
25 was insufficient. Schifferle Declaration, Exh. B.

26
27 ² Please note that this figure does not include attorneys' fees incurred by Wurlitzer as a result of Tenants' default
28 under the Promissory Note, though the Promissory Note contains an attorneys' fees provision, which Wurlitzer
intends to claim when it is able to fully calculate its attorneys' fees.

1 In response to the returned payment, Tenants drafted a letter to Wurlitzer dated June 8,
2 2011, requesting that Wurlitzer agree to a payment plan to bring the arrearages under the
3 Promissory Note and Lease current. Schifferle Declaration, Exh. C. Eager to work with the
4 Tenants, Wurlitzer sent a letter one day later to the Tenants setting forth a revised payment plan.
5 Schifferle Declaration, Exh. D. Tenants stated that they appreciated that Wurlitzer was “working
6 with us” and Tenants made some payments pursuant to the revised payment plan, totaling
7 \$21,048.17 of the \$51,160.79 then due and owing. Schifferle Declaration, Exh. E. The Tenants
8 failed to make any additional payments pursuant to the plan and only made payments for part of
9 April 2011 rent, May 2011 rent, June 2011 rent, August 2011 rent and a partial Promissory Note
10 payment. Schifferle Declaration at ¶7.

11 After the Tenants defaulted under the terms of the payment plan, Wurlitzer made a
12 subsequent offer to the Tenants to “work with [the Tenants] to allow [them] time to conduct a
13 liquidation sale, conclude . . . business and to move out of the Premises, all of which can be
14 arranged through a lease termination agreement.” Schifferle Declaration, Exh. F. Tenants
15 responded by letter, confirming that they could not “afford to pay more” while simultaneously
16 rejecting Wurlitzer’s offer to “enter into a lease termination agreement.” Schifferle Declaration,
17 Exh. G.

18 Tenants owe \$53,731.76 for pre-petition defaults of the Lease and \$7,370.34 for unpaid
19 Promissory Note payments. Schifferle Declaration at ¶10.

20 D. The Final Three-Day Notice and Unlawful Detainer Proceeding

21 On August 16, 2011, Wurlitzer personally served on Tenants a: (1) Three-Day Business
22 Notice to Pay Rent or Quit for unpaid base rent (“Three-Day Notice to Pay Rent”) and (2) Three-
23 Day Business Notice to Cure Breach of Covenant or Quit for unpaid Promissory Note payments,
24 insurance payments and tax payments (together, “Three-Day Notices”). Schifferle Declaration,
25 Exh. H. Wurlitzer declared a forfeiture of the Lease in the final paragraph of the Three-Day
26 Notice to Pay Rent. *Id.* As of August 15, 2011, the Tenants owed \$22,334 in base rent and
27 \$19,431.40 in Promissory Note payments, insurance payments and tax payments. Schifferle
28 Declaration at ¶11. The Tenants failed to make any payments set forth in the Three-Day Notices,

1 resulting in a termination of the Lease. *Id.*

2 On August 25, 2011, Wurlitzer filed an Unlawful Detainer Complaint against the Tenants
3 in San Mateo Superior Court, Case Number CLJ 204490 ("Complaint"). Schifferle Declaration,
4 Exh. I. The Tenants failed to respond to the Complaint and the Clerk entered a Default against
5 the Tenants on September 1, 2011. Schifferle Declaration, Exh. J. The Clerk of the Superior
6 Court entered a Default Judgment against the Tenants on September 13, 2011 -- the same day the
7 Debtor and Mr. Toth filed their bankruptcy petitions.³ Schifferle Declaration, Exh. K.

8 E. The Bankruptcy Filing and Proposed Chapter 13 Plan

9 On September 13, 2011, the Debtor filed his Chapter 13 case in the Bankruptcy Court for
10 the Northern District of California, San Francisco Division, Case No. 11-49863. According to the
11 Debtor's Chapter 13 Statement of Current Monthly Income and Calculation of Commitment
12 Period and Disposable Income filed on September 13, 2011, the Debtor has no monthly
13 disposable income. And, under the Debtor's proposed Chapter 13 Plan ("Plan"), he proposes to
14 make monthly payments of \$750 to the Chapter 13 Trustee to pay two specifically-named
15 creditors: California Bank and Trust and Oakland Business Development Corporation. *See Plan*,
16 ¶ 2. There is no provision in the Plan for payment to Wurlitzer under the terms of the Lease or
17 Promissory Note. *See Plan*, ¶ 4. All the while, the Debtor proposes in his Plan to assume the
18 Lease. *Id.* at ¶ 7.

19 Post-petition, Tenants have made no payments due under the Lease or under the
20 Promissory Note payments. Schifferle Declaration at ¶10.

21 **II. THE DEBTOR CANNOT ASSUME THE LEASE**

22 In his Motion, the Debtor states that he "has paid all rents coming due after the filing of
23 this case and is prepared to pay lessor all rents that come due. Motion at ¶4. Debtor will cure all
24 pre-petition rental arrearages within a reasonable time." *Id.* The Debtor however, does not
25

26 ³ Since the Default Judgment was entered on the Debtor's petition date, it is unclear whether the Default Judgment
27 was entered before or after the Debtor filed bankruptcy. As a result of this ambiguity and in an abundance of caution,
28 Wurlitzer and Debtor signed a Stipulation For Limited Relief from Stay and filed it with the Court on October 11,
2011, agreeing to give Wurlitzer limited relief from stay to request that the Superior Court vacate the Default
Judgment. The proposed order approving the Stipulation was entered by the Court on October 17, 2011.

1 provide any evidence to support either: (i) that he has paid all post-petition rents; or (ii) an
2 explanation of how he will cure all pre-petition rental arrearages “within a reasonable time.” That
3 is because there is no supporting evidence.

4 The evidence as set forth in the Schifferle Declaration, proves that the Debtor has not
5 made a single post-petition rent or Promissory Note payment. In addition, under the terms of the
6 Debtor’s proposed Plan, the Debtor proposes to pay \$750 per month to the Chapter 13 Trustee.
7 *Id.* at ¶ 1. There is no provision in the Debtor’s Plan for any Lease payments, insurance
8 payments, real property tax payments, Promissory Note payments, adequate protection payments
9 or any payment of any kind to Wurlitzer. *Id.* Nor is there any mention in the Plan about curing
10 the amounts past due under the Lease and Promissory Note. *Id.* Yet, without providing any
11 provision for payment to Wurlitzer and without having made any post-petition payments to
12 Wurlitzer, the Debtor proposes in his Motion to assume the Lease. *Id.* at ¶ 7.

13 The Debtor cannot do so for two reasons: (1) as a matter of law, the Lease was terminated
14 pre-petition and such termination cannot be reversed under California antitorfeiture law; and (2)
15 even if the Lease was not terminated, the Debtor cannot satisfy 11 U.S.C. §365(d)(3)(requiring
16 payment of post-petition lease obligations) and 11 U.S.C. §365(b)(1)(A)(requiring cure or
17 adequate assurance of future performance).

18 A. As a Matter of Law, the Lease Terminated Pre-Petition And Such Termination
19 Cannot Be Reversed

20 Assumability of a lease by a debtor in bankruptcy, in the context of a lease termination
21 claim, involves a two-part test. *Vanderpark Properties, Inc. v. Buchbinder (In re Windmill*
22 *Farms, Inc.)*, 841 F.2d 1467, 1469-72 (9th Cir. 1988). First, the Court must determine whether the
23 lease terminated before the bankruptcy petition was filed. *Id.*, see also 11 U.S.C. §365(c)(3)
24 (“[t]he trustee may not assume or assign any executory contract or unexpired lease of the debtor .
25 . . if . . . such lease is of nonresidential real property and has been terminated under applicable
26 nonbankruptcy law prior to the order for relief”). And, if so, the Court must determine whether
27 termination could have been reversed under state antitorfeiture or other applicable state law. *Id.*
28

1 1. The Landlord Terminated the Lease Pre-Petition

2 California Code of Civil Procedure Section 1161(2) specifies when a lease terminates
3 under California law:

4 A tenant of real property . . . is guilty of unlawful detainer:

5 When he or she continues in possession, in person or by subtenant,
6 without the permission of his or her landlord, or the successor in
7 estate of his or her landlord, if applicable, after default in the
8 payment of rent, pursuant to the lease or agreement under which the
 property is held, and three days' notice, in writing, requiring its
 payment . . . shall have been served upon him or her

9 After the three-day notice period has passed and the tenant has not cured the default and
10 remains in possession of the premises, the landlord may file an unlawful detainer complaint and
11 proceed under Code of Civil Procedure Section 1174(a) (providing for the process to obtain an
12 unlawful detainer judgment). *See Vanderpark Properties, Inc. v. Buchbinder (In re Windmill*
13 *Farms, Inc.)* 841 F.2d at 1470. Therefore, upon the expiration of the three days after the landlord
14 has given the tenant notice under Section 1161(2), if the tenant failed to pay the rent in default,
15 the landlord has terminated the tenant's right to possession. *Westside Apartments, LLC v. Butler*
16 *(In re Butler)*, 271 B.R. 867, 870 (Bankr. C.D. Cal. 2002).

17 The determination about whether the Lease terminated pre-petition is cut and dry. Under
18 California Code of Civil Procedure Section 1161(2), the Lease terminated in August 2011 –about
19 a month before the Debtor filed his Chapter 13 petition. On August 1, 2011, Wurlitzer personally
20 served the Three-Day Notices on all Tenants. Wurlitzer declared a forfeiture of the Lease in the
21 final paragraph of the Three-Day Notice to Pay Rent, entitling Wurlitzer to immediate possession
22 of the Premises upon entry of a Default Judgment in the Unlawful Detainer lawsuit. *See* Cal. Civ.
23 Proc. §1174(c). Tenants did not make the payments to Wurlitzer to cure the defaults set forth in
24 the Three-Day Notices within the three-day timeframe. In fact, Tenants have not made any
25 payments at all to cure the defaults. Therefore, the Lease terminated pre-petition.

26 B. The Debtor is Not Entitled to Relief from Forfeiture

27 California Code of Civil Procedure Section 1179 provides an escape hatch for a lease that
28 has been terminated pursuant to a three-day notice. California Code of Civil Procedure Section

1 1179 states as follows:

2 The court may relieve a tenant against a forfeiture of a lease or
3 rental agreement, whether written or oral, and whether or not the
4 tenancy has terminated, and restore him or her to his or her former
5 estate or tenancy, in case of hardship, as provided in Section 1174.
6 The court has the discretion to relieve any person against forfeiture
7 on its own motion.

8 An application for relief against forfeiture may be made at any time
9 prior to restoration of the premises to the landlord. The application
10 may be made by a tenant or subtenant, or a mortgagee of the term,
11 or any person interested in the continuance of the term. It must be
12 made upon petition, setting forth the facts upon which the relief is
13 sought, and be verified by the applicant. Notice of the application,
14 with a copy of the petition, must be served at least five days prior to
15 the hearing on the plaintiff in the judgment, who may appear and
16 contest the application. Alternatively, a person appearing without
17 an attorney may make the application orally, if the plaintiff either is
18 present and has an opportunity to contest the application, or has
19 been given ex parte notice of the hearing and the purpose of the oral
20 application. **In no case shall the application or motion be
21 granted except on condition that full payment of rent due, or
22 full performance of conditions or covenants stipulated, so far as
23 the same is practicable, be made.**

24 Cal. Civ. Proc. § 1179 (emphasis added). Wurlitzer will assume, for the sake of argument, that
25 Debtor's proposed Plan and Debtor's Motion for Assumption of Unexpired Lease (filed on
26 September 30, 2011) constitute Debtor's motion for relief from forfeiture under Section 1179.

27 The question remains, however, whether the Debtor can satisfy his burden to show that
28 relief from forfeiture of the Lease is appropriate. The cases apply equitable principles to make
29 this determination. *Thrifty Oil Co. v. Batarse*, 174 Cal.App.3d. 770, 777 (1985); *Olympic*
30 *Auditorium, Inc. v. Superior Court*, 81 Cal.App. 283, 286 (1927). "The manifest purpose of
31 Section 1179 of the Code of Civil Procedure is to provide for relief where a hardship would be
32 created by reason of forfeiture." *Id.* However, the mere fact that a hardship exists does not,
33 automatically and by itself, qualify as a basis upon which to grant relief from forfeiture. *Id.* This
34 is because hardship exists in almost all cases where relief is not granted. *Id.* The test for relief
35 under Section 1179 is as follows:

36 Under section 1179, the court in balancing the equities should take
37 into consideration the circumstances of the case, the hardship, if
38 any, to the lessee from the forfeiture, the hardship, if any, to the
39 lessor from relieving the lessee from the forfeiture, the willful or
40 other character of the breach, and then the use of its best discretion

1 in determining whether relief will be granted.

2 A court in the circumstances herein should engage in a weighing
3 process for a determination as to whether denying relief would be
4 manifestly unjust. Examples of considerations to be examined in
5 this weighting process include: the nature and character of the
6 breach; the hardship, if any, to the lessee from the forfeiture, the
7 hardship, if any, to the lessor from relieving the lessee from the
8 forfeiture, the good faith or lack of it on the part of any party,
9 whether lessor [or] lessee . . . the extent of bad faith, if any, on the
10 part of any party, whether lessor [or] lessee; the degree of
11 arbitrariness or unreasonableness on the part of lessors . . . if such
12 exists . . . ; and any other similar factors relevant to the issues to be
13 resolved.

14 *Thrifty Oil Co. v. Batarse*, 174 Cal.App.3d. at 778; see also *Hignell v. Gebala*, 90 Cal.App.2d
15 61,70-71 (1949).

16 Taking these factors together, Wurlitzer submits that no grounds exist to relieve Debtor of
17 the forfeiture under Section 1179.

18 1. The Debtor Breached the Lease in Four Different Ways Thirty Different Times

19 It is undisputable that the Debtor is guilty of four distinct breaches of the Lease: (1) for
20 failure to pay rent; (2) for failure to pay its proportionate share of insurance payments; (3) for
21 failure to pay its proportionate share of real property taxes; and (4) for failure to make any
22 payments due under the Promissory Note. The Lease required rent, reimbursement for insurance
23 and real property taxes and Promissory Note payments to be paid to Wurlitzer on time, and the
24 Debtor was well aware of these requirements under the Lease. Strikingly, the Debtor did not only
25 breach the Lease in these four distinct ways on one occasion, but did so on 30 occasions. *Cf.*
26 *Thrifty Oil Co. v. Batarse* 174 Cal.App.3d 770, 777 (1985) (finding that the debtor's one-time
27 breach for failing to obtain consent to sublease as favoring denial of forfeiture). Each and every
28 breach on each and every of these 30 occasions favors denial of relief from forfeiture. *Id.*

29 2. Relief from Forfeiture Would Unduly Burden Wurlitzer

30 After weathering the storm of four kinds of breaches of the Lease on 30 separate
31 occasions, it would overburden Wurlitzer to continue to weather this storm with the Debtor. The
32 Debtor does not have the financial wherewithal going forward to perform under the Lease. This
33 was made clear by the Debtor's Statement of Current Monthly Income and Calculation of

1 Commitment Period and Disposable Income, Bankruptcy Schedules and Plan, where Debtor
2 claims to not have any disposable income on a monthly basis and proposes to pay the Chapter 13
3 Trustee \$750 per month to pay some creditors, but not Wurlitzer (which would be owed over
4 \$9,500 per month under the Lease and Promissory Note).

5 Tellingly, the Debtor has not made any post-petition payments due under the Lease or
6 Promissory Note and has not made any provision in his Plan to cure such pre-petition defaults and
7 make the post-petition payments. Yet, the Debtor proposes to assume the Lease without
8 providing any evidence of his financial ability to cure the over \$61,100 in defaults (not including
9 attorneys' fees) under the Lease or his ability to perform his obligations under the Lease. Indeed,
10 the evidence confirms that the \$750 monthly payment to the Chapter 13 Trustee cannot cover
11 even 10% of the monthly rent under the Lease (let alone Promissory Note payments) and the
12 Debtor does not even propose to use the \$750 payment to pay the rent under the Lease. The
13 Debtor cannot have it both ways: he cannot obtain relief from forfeiture and assume the Lease
14 without proffering any plan or evidence of his ability to cure the defaults and perform under the
15 Lease. Cal. Civ. Proc. § 1179 (relief from forfeiture cannot be granted unless tenant makes a "full
16 payment of rent due"). Granting relief from forfeiture would only doom Wurlitzer to have to
17 survive additional defaults by the Debtor going forward, increase Wurlitzer's costs and attorneys'
18 fees to deal with the default, increase Wurlitzer's claim at the rate of over \$9,500 per month and
19 delay Wurlitzer's ability to re-lease the Premises to a willing, able and paying tenant.

20 Wurlitzer understands that the Debtor is using the Premises as a furniture store and that
21 termination of the Premises may result in a hardship for the business, depending on whether the
22 Debtor can relocate his business. Juxtaposed against the over \$61,100 owing Wurlitzer as of
23 October 1, 2011, the multiple defaults by the Debtor of the Lease (including the failure to pay
24 post-petition amounts due) and likelihood of future defaults of the Lease by the Debtor, Wurlitzer
25 would sustain a greater hardship than Debtor if the Court granted relief from forfeiture.

26 3. Wurlitzer Acted in Good Faith and the Debtor Has Acted Unreasonably

27 Since 2009, Wurlitzer has cooperated with the Debtor to make every effort to keep the
28 Debtor in the Premises and to avoid terminating the Lease. Wurlitzer has served the Debtor with

1 numerous three-day notices for the Debtor's numerous defaults under the Lease and Promissory
2 Note. Sometimes the Debtor was able to pay within the three-day notice period; other times
3 Debtor could not do so. After every three-day notice there was an attempt by both the Debtor and
4 Wurlitzer to make arrangements to keep the Debtor in the Premises. Indeed, Wurlitzer agreed to
5 help the Debtor get back on track with the Lease and Promissory Note payments by agreeing to a
6 payment plan for past defaults. The Debtor agreed to the payment plan, but soon defaulted under
7 the terms of that plan. Acknowledging that the Debtor was continuing to struggle, Wurlitzer
8 reached out to the Debtor and offered to terminate the Lease while giving the Debtor time to
9 liquidate the furnishings at the store or move the furnishings. Presumably, in denial, perhaps in
10 bad faith, but certainly unreasonably, the Debtor refused Wurlitzer's Lease termination offer.

11 Despite good faith efforts and much patience by Wurlitzer, at this point, the parties cannot
12 deny the Debtor's economic reality: that the revenues of the Debtor's furniture store and the
13 Debtor's income have dwindled over the past two years, with little, to no, hope or evidence of
14 recovery. As discussed above, this is confirmed by the Debtor's admission in his Debtor's
15 Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and
16 Disposable Income, which shows no disposable income and the Debtor's Plan, which does not
17 provide for payment to Wurlitzer. It is questionable whether Debtor acted in good faith,
18 especially considering that the Debtor refused Wurlitzer's Lease termination offer. There is no
19 question, however, that Wurlitzer acted in good faith. Therefore, this factor tips in favor of
20 Wurlitzer.

21 C. The Debtor Cannot Satisfy Its Burden to Prove That Assumption of the Lease Is
22 Appropriate

23 Even assuming, for the sake of argument, that the Lease was not terminated pre-petition or
24 that the Debtor is entitled to relief from forfeiture, the Debtor cannot (and has not tried to) satisfy
25 the elements necessary to prove that the Lease should be assumed.

26 Section 365(b)(1) of the Bankruptcy Code provides:

27 If there has been a default in an executory contract or unexpired
28 lease of the debtor, the trustee may not assume such contract or
lease unless, at the time of assumption of such contract or lease, the

trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

As detailed above, there are substantial defaults under the Lease. Consequently, the Debtor has the burden to demonstrate compliance with Sections 365(b)(1)(A)-(C). Section 365(b)(1)(A) requires the Debtor to cure, or provide adequate assurance that the Debtor will promptly cure, defaults under the Lease. “The language of §365(b)(1)(A) clearly and unambiguously requires the cure of all defaults before a lease may be assumed.” *In re Building Block Child Care Ctrs., Inc.* 234 B.R. 762, 765 (9th Cir. BAP 1999).

The Debtor does not propose a cure of the defaults under the Lease. Instead, without any offer of admissible evidence, he has stated that he “will cure all pre-petition rental arrearages within a reasonable time.” There is no mention of when payments will be made, how payments will be made or the amount of the payments. In addition, there is no mention in the Motion about curing the Promissory Note payments. There is no plan or proof of cure of the rent payments or the Promissory Note Payments in the Debtor’s Motion. Since, the Debtor cannot satisfy the requirements of Section 365, he cannot assume the Lease and the Motion should be denied.

Even if the Debtor did provide a plan to cure the defaults under the Lease, the Debtor provides no evidence of his ability to cure. For example, there is no provision in the Debtor’s Plan for any Lease payments, insurance payments, real property tax payments, Promissory Note

1 payments, adequate protection payments or any payment of any kind to Wurlitzer. There is a
2 long and repeated history of the Debtor failing to cure defaults under the Lease and the Debtor
3 will be unable to demonstrate that it will honor those provisions of the Lease now. Notably,
4 despite Debtor's promises to pay all post-petition rents, it cannot be disputed that the Debtor has
5 not made a single post-petition rent payment. In addition, the Debtor has not made any post-
6 petition Promissory Note payments. The fact that the Debtor has not made such mandatory post-
7 petition rent payments and Promissory Note payments further demonstrates the Debtor's inability
8 to assume the Lease. 11 U.S.C. §365(d)(3); *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d
9 846, 850-51 (9th Cir. 2001)(obligation to repay promissory note payments under lease is an
10 obligation covered under 11 U.S.C. §365(d)(3)).

11 Finally, there is an incurable default under the Lease. A Default Judgment had been
12 entered against Home Haven, LLC, one of the Tenants under the Lease.

13 III. COUNTER-MOTION TO REJECT LEASE

14 For all of the reasons stated above, Wurlitzer respectfully requests that the Court enter an
15 order rejecting the Lease.

16 IV. CONCLUSION

17 The evidence establishes that the Lease was terminated and cannot be assumed by the
18 Debtor. No grounds exist to support the Debtor's relief from forfeiture of the Lease; all factors to
19 deny relief from forfeiture tip in favor of Wurlitzer. And, even assuming the Lease was
20 assumable, the Debtor has not offered any evidence to support that it could satisfy the
21 requirements under 11 U.S.C. §365(d)(3) and 11 U.S.C. §365(b)(1)(A) necessary to assume the
22 Lease. The Motion, seeking to assume the Lease should be denied, the counter-motion to reject
23 the Lease should be granted and the Court should enter a surrender order in favor of Wurlitzer.

24 Dated: October 19, 2011

CARR, McCLELLAN, INGERSOLL, THOMPSON &
HORN Professional Law Corporation

25 By: 

Jennifer C. Johnson

26 Attorneys for Creditors Bank of America, N.A.,
27 Dorothy R. Wurlitzer and Lindsay P. Wurlitzer as
28 Co-Trustees of the Raimund B. Wurlitzer Revocable
Inter Vivos Trust dated January 29, 1981